80-2079

Office Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO.

JANET RENO, State Attorney of Dade County, Florida, and JIM SMITH, Attorney General of Florida,

Petitioners,

vs.

CONCERNED DEMOCRATS OF FLORIDA, and EDWARD COHEN, President of Concerned Democrats of Florida,

Respondents.

* * * * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * * * * * * * * * * * * * *

BRIEF OF PETITIONERS

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QUESTION PRESENTED

WHETHER IN FACT (AS OPPOSED TO THEORY), THE TRIAL COURT HAS ANY DISCRETION TO DENY A PREVAILING PARTY AN AWARD OF ATTORNEY'S FEES AS PROVIDED BY THE CIVIL RIGHTS ATTORNEY FEE AWARD ACT (42 U.S.C.§ 1988) AND WHETHER THE TRIAL COURT BASED UPON THE SPECIAL CIRCUMSTANCES FOUND TO BE PRESENT IN THE CASE AT BAR PROPERLY DENIED AN AWARD OF ATTORNEY'S FEES TO THE PREVAILING PARTY?

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PREFACE

The Petitioners, Jim Smith, Attorney General of the State of Florida and Janet Reno, the State Attorney of Dade County were the appellees in the United States Court of Appeals for the Fifth Circuit and the defendants in the United States District Court for the Southern District of Florida. Respondents, Concerned Democrats of Florida and its president, Edward Cohen were the appellants in the Fifth Circuit Court of Appeals and plaintiffs in the Southern District Court. In this brief, the parties will be referred to as petitioners and respondents.

The symbol"App"will be used to designate the Appendix which contains the relevant portions of the record to show jurisdiction in this Court.

I

OPINIONS BELOW

1.) The opinion of the United States Court of Appeals, Fifth Circuit vacating the District Court's order of denial and remanding the cause for an appropriate award of fees or finding on and statement of the special circumstances which render such an award unjust is reported as Concerned Democrats of Florida v.Reno, 601 F.2d 891 (5th Cir. 1979).

2.) The opinion of the District Court upon remand which contains a statement of the special circumstances which render such an award unjust is reported as Concerned Democrats of Florida v. Reno, 493 F.Supp.660 (S.D.Fla. 1980).

3.) The opinion of the United States District Court of Appeal dated December 8, 1980 reversing the district court and awarding Concerned Democrats a $3,262.50 attorney's fee is not reported and is contained in the attached appendix at(APP-A).

II

JURISDICTION

The opinion of the United States Court of Appeal for the Fifth Circuit was entered on December 8, 1980. A petition for rehearing or rehearing en banc was denied on February 9, 1981.(APP-G). An order granting the Petitioner's an extention of time of thirty (30) days in which to file its Petition for Certiorari was entered on May 9, 1981.(App-H). The jurisdiction of this Court is invoked pursuant to Title 28 United States Code 1254(1).

III

STATUTORY PROVISIONS

Title 42 United States Code § 1988

(Civil Rights Attorney's Fees Award Act)

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the

United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.
As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

IV

STATEMENT OF THE CASE

Under the provision of Title 42 U.S.C.§ 1983, respondents filed a complaint seeking to enjoin the petitioners from enforcing the provisions of Section 105.09, Florida Statutes (1977) which prohibits state political organizations from using their political affiliation to endorse judicial candidates. Petitioners did not file any record opposition to respondents' complaint or effort to seek temporary and permanent injunctive relief. The district court determined the subject statute to be unconstitutional and enjoined its enforcement temporarily and then permanently. Concerned Democrats of Florida v. Reno, 458 F.Supp. 60 (S.D.Fla.1978); (App-B). Petitioners did not appeal the issuance of the permanent injunction.

Thereafter, respondent's filed a motion for an award of attorneys fees as prevailing parties under the Civil Rights Attorney's Fees Award Act of 1976, Title 42 U.S.C.§ 1988. Petitioners opposed the granting of such an award upon the record in the case. By order of January 16, 1979, the district court determined that an award of attorney's fees to be inappropriate in this case and denied respondent's attorney's fees without stating in the denial order any findings or conclusions. (APP-C).

Respondents appealed the denial of attorney's fees to the United States Court of Appeals for the Fifth Circuit

which entered an opinion (dated August 31, 1979) vacating the district court's denial order and "remanded for an appropriate award of fees or for a finding on and a statement of the special circumstances which render such an award unjust." Concerned Democrats of Florida v. Reno, 601 F.2d 891 (5th Cir. 1979). (APP-D).

Upon remand, the district court on March 26, 1980 entered an order denying attorney's fees and made extensive findings as to the special circumstances which rendered such an award unjust in this case. Concerned Democrats of Florida v. Reno, 493 F.Supp. 660 (S.D. Fla. 1980). (APP-E).

Respondents again appealed this order denying attorney's fees. The Fifth Circuit Court of Appeals by unpublished opinion of December 8, 1980 reversed the March 26, 1980 judgment of the district court and awarded respondents fees in the amount of $3,262.50.(APP-A) Petitioners filed a petition for rehearing and/or petition for rehearing en banc which was denied on February 9, 1981. (APP-G).

V

ARGUMENT

The Civil Rights Attorney's Fee Awards Act of 1976, as amended, 42 U.S.C.§ 1988 specifically provides that "the court, in its discretion may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs" in suits brought under Title 42 U.S.C.§§ 1981-1986. The language of this act clearly gives the district court broad discretion to make the initial determination of whether to allow an award of attorney's fees and the determination is not to be disturbed absent an abuse of discretion. Harkless v. Sweeny Independent School District, 608 F.2d 594, 596 (5th Cir. 1979); Sargeant v. Sharp, 579 F.2d 645, 647 (5th Cir. 1978). Although petitioners recognized the development of the rule that prevailing plaintiffs in civil rights actions should ordinarily recover attorneys' fees unless special circumstances would render an award of them unjust [Concerned Democrats of Florida v. Reno, 601 F.2d 891, 892 (5th Cir. 1979)], this rule is not to be applied rigidly without consideration of the principles which granted it. Zarcone v. Perry, 581 F.2d 1039, 1044 (2nd Cir.1978) cert. denied 439 U.S. 1072 (1979). Thus, petitioners would submit that there is no absolute right to an award of attorney's fees under Title 42 U.S.C.§ 1988 and the district court still has discretion to deny attorney's fees to a prevailing plaintiff. For the purpose

of Title 42 U.S.C.§ 1988 is to permit and encourage the redress of the civil rights violations of victims, but not to create a civil rights fee bank to be liberally drawn upon by lawyers for their own welfare. Coop v. City of South Bend, 635 F.2d 652 (7th Cir. 1980).

The issue as to the existence of special circumstances that justify the denial of an attorney's fee award requires a pragmatic inquiry focusing on justice under the total range of circumstances. Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979). Therefore, in making a determination as to whether an attorney's fee should be awarded to a prevailing civil rights plaintiff, the trial court in the exercise of its discretion should consider as a principal factor whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorney's fees would be paid if he were successful. Zarcone v. Perry, 581 F.2d 1039, 1044 (2nd Cir. 1978), supra. Some other relevant factors entitled to consideration are the size of the benefits conferred by the suit on the public, the presence or absence of any bad faith or obdurate conduct on the part of either of the parties and any unjust hardship that a grant or denial of the attorney's fees award might impose. Zarcone, id; Buxton v. Patel, 595 F.2d 182 (9th Cir. 1978).

Additional special circumstances or factors which should and have been recognized are little or no public benefit

conferred by the suit and the extent of the legal services rendered. Riddell v. National Democratic Party, 624 F.2d 539, 544-45 (5th Cir. 1980); Aware Woman Clinic v. City of Cocoa Beach, 629 F.2d 1146 (5th Cir. 1980).

In its opinion denying attorney's fees, the district court found that the following combined special circumstances (which rendered an award unjust) to be present:
1) good faith on the part of petitioners,
2) unintentional discrimination (i.e.the statute did not discriminate against any particular group nor in any respect involve discrimination based on sex, race or religion,
3) respondent's financial ability to pay attorney's fees (a political group of over 4,000 members who are informed, politically partisan and active citizens),
4) petitioners good faith belief that the challenged statute was valid and
5) the burden of the fee award would fall upon the taxpayers.
Finally, the district court found that the benefit conferred by this suit upon the public was weak because of the state's interest in preserving the non-partisan nature of judicial elections. Concerned Democrats of Florida v. Reno, 493 F.Supp. 660 (S.D.Fla. 1980). Furthermore, it is obvious that the respondents would, without question, have not been deterred from filing the instant suit without an assurance that its attorney's fees would be paid if successful. Last, with regards to the extent

of the legal services rendered, there was no record opposition by the petitioners in this case and, therefore, the action seeking injunctive relief was nothing more than a mere academic exercise.

Considering the numerous special circumstances present in the case at bar in light of the aforementioned principles of law, petitioners submit that the district court was well within its discretion in concluding that an award of attorney's fees would be unjust. Therefore, petitioners believe that the Circuit Court departed from the accepted and usual course of judicial proceedings by overruling the district court without finding an abuse of discretion on the part of the district court in denying attorney fees.

CONCLUSION

If, in fact, the trial court has any discretion to deny a prevailing party an award of attorney's fees as provided under Title 42 U.S.C.§ 1988 then the record in the case at bar clearly demonstrates that the district court did not abuse its discretion in concluding after a pragmatic inquiry under the circumstances that the award of attorney's fees would not be just. Because of the importance of the question presented, petitioner respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted on this ____ day of June 1981, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General

ALAN T. LIPSON, Esquire
Assistant Attorney General

APPENDIX

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IN THE UNITED STATES COURT OF APPEAL

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-5482
Summary Calendar

CONCERNED DEMOCRATS OF FLORIDA and EDWARD COHEN, President of Concerned Democrats,
Plaintiffs-Appellants,

versus

JANET RENO, State Attorney of Dade County, Florida, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before GODBOLD, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

In this civil rights case plaintiffs prevailed. The district court denied attorney fees with an order merely stating that an award would be "inappropriate." On appeal, Concerned Democrats of Florida v. Reno, 601 F.2d 891 (5th Cir. 1979), we vacated the denial and remanded for an appropriate award of fees or for a finding of special circumstances that would make an award unjust. On remand the district court has again

denied attorney fees.

The judgment of the district court is REVERSED. The plaintiffs are awarded fees in the amount of $3,262.50 for services performed prior to the first appeal, an amount suggested by them upon time spent at $75.00 per hour, which under the circumstances of this case, bearing in mind the factors set out in Johnson v. Georgia Highway Express, Inc. 488 F.2d 714 (5th Cir. 1974), is the minimum to which plaintiffs are entitled.

If the parties cannot agree upon attorney fees for the two appeals, plaintiffs may submit a motion for such fees, supported by affidavits, within 20 days from the date of this opinion, and respondents may file counter-affidavits and/or brief within 20 days thereafter.

REVERSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-3994-Civ-SMA

CONCERNED DEMOCRATS OF FLORIDA
AND EDWARD COHEN, PRESIDENT
OF CONCERNED DEMOCRATS

vs. PERMANENT INJUNCTION

JANET RENO, STATE ATTORNEY
OF DADE COUNTY, FLORIDA,
AND ROBERT SHEVIN, ATTORNEY
GENERAL OF FLORIDA

By stipulation, all parties to this action have agreed that the hearing for a preliminary injunction be consolidated with the trial on the merits in accordance with F.R.C.P. 65(a)(2). Accordingly, the court will consider the evidence that was adduced at the hearing for preliminary injunction in arriving at its determination of the merits of this cause.

Based on the findings of fact and conclusions of law contained in this court's order of September 6, 1978, it is hereby

ORDERED AND ADJUDGED that defendants are permanently enjoined from taking any action to enforce the prohibition of Fla.Stat. §105.09.

DONE AND ORDERED this 21st day of September, 1978.

/s/ Norman C. Roettger Jr.
United States District Judge

cc- Steven Wisotsky, Esq.
Janet Reno, Esq.
Robert Shevin, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-3994-CIV-NCR

CONCERNED DEMOCRATS OF FLORIDA and EDWARD COHEN, PRESIDENT OF CONCERNED DEMOCRATS,
Plaintiff,

vs.

JANET RENO, State Attorney of Dade County, Florida, and ROBERT SHEVIN, Attorney General of Florida.
Defendants

THIS CAUSE is before the court on motion by plaintiffs' counsel for attorney's fees pursuant to 42 U.S.C.§1988, as amended Pub.L.94-559,§2,90 Stat.2641.

Upon consideration of the record in this cause,the court concludes that an award of attorney's fees would be inappropriate in this case. Accordingly, it is hereby

ORDERED AND ADJUDGED that plaintiffs' counsel's motion is denied.

DONE AND ORDERED this 16th day of January, 1979.

/s/ Norman C. Roettger Jr.
United States District Judge

cc-Steven Wisotsky
William Grodnick, Asst. Atty General
Tom Petersen, Asst. State Attorney

CONCERNED DEMOCRATS OF FLORIDA, and Edward Cohen, President of Concerned Democrats of Florida, Plaintiffs-Appellants,

v.

Janet RENO, State Attorney of Dade County, Florida, and Jim Smith, Attorney General of Florida, Defendants-Appellees.

No.79-1652
Summary Calendar.*

United States Court of Appeals, Fifth Circuit

Aug. 31, 1979.

Prevailing plaintiffs in civil rights suit appealed from an order of the United States District Court for the Southern District of Florida, Norman C.Roettger,Jr.,J., denying a motion for attorney fees. The Court of Appeals held that trial court's order denying attorney fees to civil rights plaintiffs who persuaded district court to interfere by injunction with a portion of the Florida judicial election plan would be vacated and cause remanded for an appropriate award of fees or for a finding on and statement of special circumstances which would render such an award unjust.

Vacated and Remanded.

1.Civil Rights - 13.17

Prevailing plaintiffs in civil rights action should ordinarily recover attorney fees unless special circumstances would render an award of then unjust. 42 U.S.C.A. § 1988.

2. Federal Courts - 945

Trial court's order denying attorney fees to civil rights plaintiffs who persuaded district court to interfere by injunction with a portion of the Florida judicial election plan would be vacated and cause remanded for an appropriate award of fees or for a finding on and statement of special circumstances which would render such an award unjust. 42 U.S.C.A. § 1988.

Steven Wisotsky, Fort Lauderdale, Fla., for plaintiffs-appellants.

Calvin L. Fox, Asst. Atty. Gen., Miami, Fla., for Hon. Jim Smith, Atty. Gen.

Appeal from the United States District Court for the Southern District of Florida.

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

Plaintiff-Appellants prevailed below in a civil rights suit in which they persuaded the district court to interfere by injunction with a portion of the Florida judicial selection plan forbidding partisan political organizations from endorsing judicial candidates. They sought an award of attorneys' fees for this advancement of the public interest at their private instance, but were rebuffed by a denial stating merely that such an award "would be inappropriate in this case."

[1,2] 42 U.S.C. Section 1988 places the award of such fees within the trial court's discretion but it is settled law in this circuit that this means more than it appears to say and that such prevailing parties as plaintiff should ordinarily recover attorneys' fees unless special circumstances would render an award of then unjust. See Morrow v. Dillard, 580 F.2d 1284, 1300 (5th Cir. 1978). We cannot determine from this record or from the court's brief reference to inappropriateness why fees were denied. We therefore vacate the court's order of denial and remand for an appropriate award of fees or for a finding on and statement of the special circumstances which render such an award unjust. See Criterion Club v. Board of Comm'rs, 594 F.2d 118 (5th Cir. 1979).

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-3994-CIV-NCE

CONCERNED DEMOCRATS OF FLORIDA and EDWARD COHEN, PRESIDENT OF CONCERNED DEMOCRATS, Plaintiffs	)
vs	) ORDER
JANET RENO, STATE ATTORNEY OF DADE COUNTY, FLORIDA and ROBERT SHEVIN, ATTORNEY GENERAL OF FLORIDA, Defendants	)

This cause is before the court on order of remand from the Fifth Circuit Court of Appeals for a finding on and statement of any special circumstances which would render an award of attorneys fees in this case unjust. Concerned Democrats of Florida v. Reno, 601 F.2d 891 (5th Cir. 1979). Previously this court had ruled that such an award would be "inappropriate". Concerned Democrats--or its counsel--appealed that sole issue. Defendants--not wanting to imperil the treasury of the taxpayers--did not oppose the appeal. Defendants did contest any award at the subsequent proceedings.

Plaintiffs without question prevailed on the substantive issues in this case. Concerned Democrats of Florida v. Reno, 458 F.Suppl.60 (S.D. Fla. 1978). Defendants have been permanently enjoined from enforcing Fla. Stat. §105.09, and plaintiffs have

acquired the primary relief sought. They were successful on the central issue, i.e., the constitutionality of the challenged statute. Iranian Students Association v. Edwards, 604 F.2d 352 (5th Cir. 1979)[1].

The statute governing the remaining issue in this case, 42 U.S.C.A. §1988, states in plain language that "the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs."

That statute's intended purpose is as clear as its language: It is that "...the court, in its discretion,may..." (emphasis supplied) compensate prevailing parties in suits to enforce the civil rights act which Congress has passed since 1866. Legislative History S.Rep.

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[1] There plaintiffs sought and obtained a temporary restraining order which enjoined defendants from interfering with plaintiff's planned demonstrations, from enforcing the State's bonding requirements and its prohibition against amplification. Thereafter the controversy was settled by a consent decree. See also, Criterion Club of Albany v. Board of Commissioners, 594 F.2d 118 (5th Circ. 1979)(Settlement agreement which precipitated remedial legislation could support determination that plaintiff had prevailed.)

No. 94-1011, 94th Cong.2d Sess. (1976) reprinted in [1976] U.S.Code Cong. & Admin, News at 5909-5910. As stated in the Senate Report, "In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." Id. Congress enacted the Attorney's Fees Awards Act to ensure vigorous enforcement of civil rights statutes, and to further policies underlying those statutes.

The legislative history also makes it clear that the governing standards are to be the same as under the fee provisions of the Civil Rights Act of 1964. A prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S.400,402,88 S.Ct.966 (1968).[2]

Following the Supreme Court's language in Newman, supra, the Fifth Circuit has continually awarded fees to prevailing parties. The enunciated standard is identical. "A prevailing

2 The court finds it significant that the precise language of the prevailing "test" originated in a case before the Supreme Court involving blatant racial discrimination on the part of several restaurants and sandwich shops against Negro plaintiffs.

party should ordinarily recover an attorney's fee unless special circumstances render such an award unjust." Morrow v. Dillard, 580 F.2d 1284, 1300 (5th Cir. 1978).

A review of controlling Fifth Circuit authority indicates that "special circumstances" have yet to be defined in this circuit. The court has specifically rejected that either good faith on the part of defendants or a finding of unintentional discrimination rise to the level of special circumstances. Id. citing Gates v. Collier, 559 F.2d 241 (5th Cir. 1977); Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977). Likewise a plaintiff's financial ability to pay for counsel is not a special circumstance. International Society for Krishna Consciousness v. Collins, 609 F.2d 151 (5th Cir. 1980). As stated by the Fifth Circuit, all that is necessary is "the existence of an attorney-client relationship a status that exists wholly independent of compensation ... . Congress did not intend that vindication of statutorily guaranteed rights would depend on the private party's economic resources or on the availability of free legal assistance." Gore v. Turner, 563 F.2d (5th Cir. 1977). A defendant's good faith belief that a challenged statute is valid is not a special circumstance. Johnson v. State of Mississippi, 606 F.2d 635 (5th Cir. 1979). Nor is it permissible to deny an award so that its burden will not fall on the taxpayers of a state. Id.

It also seens that apparently relevant considerations which have justified the denial of attorney's fees in a previous case are no longer viable. Henderson v. Fort Worth Independent School District, 574 F.2d 1210 (5th Cir.) vacated, 584 F.2d 115 (5th Cir. 1978). In Henderson the Fifth Circuit panel had affirmed as not an abuse of discretion the trial judge's reliance on such factors as: (1) No indication that the challenged statute was "inspired by a desire to discriminate against any race, sex, or religion, or any other homogenous segment of society." Id. at 1213. (2) Enforcement of the statute (which required a candidate for a school board seat to have been a qualified voter in the district for a period of three years) was mandatory, and the defendant's compliance with court order was immediate. (3) The burden of an award would fall on taxpayers. However, since that panel opinion in Henderson was vacated by an evenly divided en banc court of appeals, all district courts that have relied on its reasoning have been reversed. See, e.g., Johnson v. Mississippi, 606 F.2d 635 (5th Cir. 1979); Iranian Students Association v. Edwards, 604 F.2d 352 (5th Cir. 1979); Criterion Club of Albany v. Board of Commissioners of Dougherty County, 594 F.2d 118 (5th Cir. 1979). In all cases, it was also pointed out that the district judges' reliance on Henderson was misplaced because it was specifically declared by the en banc court to have no precedential value. Henderson v. Fort Worth Independent School District, 584 F.2d at 116.

In considering the facts and circumstances of this case, the court is still of the opinion that an award of attorney's fees is inappropriate. If the attorney's fee statute is to mean anything resembling what its words indicate, and if the judicially created exception "special circumstances" is to have any life at all, then the court must deny plaintiff's motion in this case.

The Florida statute in question served the salutory purpose of trying to preserve the apolitical nature of this state's judicial elections. It was passed in furtherance of a permissible governmental objective. Its defect was that it swept too broadly. The statute did not discriminate against any particular group, and did not remotely involve discrimination based on sex, race or religion. It certainly did not target any group, which could be characterized as deprived or underprivileged. These observations are not meant to minimize the importance of fundamental first amendment rights in a democratic society, but to put in perspective the state's interest in proscribing political endorsements in judicial elections.

The court is well aware that bad faith on defendant's part is not a requisite finding prior to an award of attorney's fees. However, in determining whether a "special circumstance" exists which would render an award "unjust", it seems impossible that a good/bad faith determination could be deemed totally irrelevant and receive no consideration. It clearly has to figure in

somewhere if the ultimate decision is, as the statute says, discretionary.

The court also concludes that factual findings about plaintiffs can be relevant factors to consider. There are obvious distinctions between plaintiffs in this case: a political group of about 4,000 members, self-described as liberal Democrats, who are interested in screening and endorsing those candidates for judicial office who are compatible with the group's political philosophy, and the following plaintiffs: blacks who were systematically excluded from employment with the Mississippi Highway Patrol, Morrow v. Dillard, supra; students whose entitlement to free transportation to and from school depended on whether they resided outside a municipality's corporate limits, Johnson v. Mississippi, supra; blacks who were denied rentals in an apartment complex, Gore v. Turner, supra; a black who was refused a rental in an apartment complex, Bunn v. Central Realty of Louisiana, 592 F.2d 891 (5th Cir. 1979); blacks who were denied opportunity to buy in a residential development, Dillon v. AFBIC Development Corp., 597 F.2d 556 (5th Cir. 1979); blacks who were effectively precluded from being elected, by a county's at-large majority vote system, to county commission, Criterion Club of Albany v. Board of Commissioners of Dougherty County, supra.

More closely related to plaintiffs in this case, though still distinguishable, are those who brought suit in

International Society for Krishna Consciousness, supra, i.e., a religious group seeking to vindicate their right to pass out handbills in an airport facility, and in Iranian Students Association, supra, i.e. a student group who sought relief from a state requirement that a bond be posted before a planned demonstration and from a state prohibition against voice amplification. In both cases, plaintiff's proposed conduct was to be totally thwarted by statutes whose unconstitutionality was more clear than the one at issue, and whose purposes were less laudable.

As is evident from the survey of cases above, this is not a case involving a member of a racial minority, typically deprived economically, politically and educationally suing to right injustices that have existed for decades. Instead, this is a group of informed, politically partisan and active citizens who desire to make their preferences for judicial candidates known. In fact, plaintiff had to establish it was a valid and recognized partisan political organization before it had standing. 485 F.Supp at 62 n.2.

As with the good faith/bad faith consideration, the court acknowledged that a finding of "special circumstances" cannot be based solely on plaintiff's ability to pay. However, to make a discretionary finding that an award would be "unjust", the court must be free at least to consider plaintiff's financial position, as well as its stake in the

lawsuit in relation to defendants. The court must note that such a group could certainly not be considered to be politically, economically or educationally deprived. They are not typical victims of unconstitutional actions contemplated by the drafters of 42 U.S.C.A. §1988. Further, the court is not convinced that the statute attacked was of a type envisioned by that same Congress.

Finally, the court notes that in granting a temporary injunction in this case, it found plaintiffs to have met their burden on the issue of public benefit primarily on the strength of their evidence relating to other factors. Because of the state's interest in preserving the non-partisan nature of judicial elections, the court felt that plaintiff's showing of public good from publication of political endorsements was weak, although barely sufficient. The court stated at that time, "This factor is troublesome because there is an obvious interest to both the public and Legislature in having judicial candidates free of the appearance of impropriety. An appearance of partisanship will hardly foster public confidence in the courts. However, the court feels constrained under cases discussed [earlier].

"The strength of the first two factors compensates for the weakness in the fourth factor." 485 F.Supp. at 65 citing Knights of K.K.K. Realm of Louisiana vs. East Baton Rouge Parish School Board, 578 F.2d 1122 (5th Cir. 1978).

The Fifth Circuit has rejected (1) good faith on the part of defendants; (2) a finding of unintentional discrimination; (3) plaintiff's financial ability to pay counsel fees; (4) defendant's good-faith belief that a challenged statute is valid; and (5) that the burden of a fee award will fall on the taxpayers, as insufficient to constitute special circumstances creating an award of attorney's fees unjust. However, this case combines all five of these factors with the added ingredient of a plaintiff who is a partisan, political organization. Added together they rise to the level of "special circumstances".

Accordingly, the court finds an award of attorney's fees in this case to be unjust, and it is hereby

ORDERED AND ADJUDGED that plaintiff's motion for attorney's fees is denied.

DONE AND ORDERED this 26 day of March, 1980.

/s/ Norman C. Roettger, Jr.
U.S. District Judge

cc: Steven Wisotsky, Esq.
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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-5482
Summary Calendar

D. C. Docket No. 78-3994-Civ-NCR

CONCERNED DEMOCRATS OF FLORIDA and EDWARD COHEN, President of Concerned Democrats,

Plaintiffs-Appellants,

versus

JANET RENO, State Attorney of Dade County, Florida ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before GODBOLT, KRAVITCH, and HATCHETT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

It is further ordered that defendants-appellees pay to plaintiffs-appellants the cost on appeal to be taxed by the Clerk of this Court.

December 8, 1980

ISSUED AS MANDATE:



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-5482

CONCERNED DEMOCRATS OF FLORIDA and EDWARD COHEN, President of Concerned Democrats, Plaintiffs-Appellants,
versus

JANET RENO, State Attorney of Dade County, Florida, ET AL., Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion 12-8-80, 5 Cir., 198_, __F.2d__).

(February 9, 1981)

Before GODBOLD, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John Godbold
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

NO. A-917

FLORIDA,
Petitioner
v.
CONCERNED DEMOCRATS OF FLORIDA, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application for petitioner,
It Is Ordered that the time for filing a petition for writ of certiorari in the above-titled cause be, and the same is hereby, extended to and including June 10, 1981.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 11th
day of May, 1981.

Office - Supreme Court, U.S.
FILED
SEP 21 1981
ALEXANDER L. STEVAS
CLERK

NO. 80-2079

in the Supreme Court of the United States

October Term, 1981

JANET RENO, State Attorney of Dade County, Florida, and JIM SMITH, Attorney General of Florida,
Petitioners

vs.

CONCERNED DEMOCRATS OF FLORIDA, and EDWARD COHEN, President of Concerned Democrats of Florida,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS APPLIED SETTLED DOCTRINE IN AWARDING ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1988 IN A CASE IN WHICH THE DISTRICT COURT TWICE HAD FAILED TO COMPLY WITH THE CONTROLLING PRECEDENTS IN, FIRST, DENYING FEES AS "INAPPROPRIATE" AND THEN, ON REMAND AFTER REVERSAL, AGAIN DENYING FEES AS "INAPPROPRIATE" BY AGGREGATING AS "SPECIAL CIRCUMSTANCES" FIVE FACTORS THAT THE COURT OF APPEALS EXPLICITLY HAD HELD NOT TO CONSTITUTE "SPECIAL CIRCUMSTANCES"

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STATEMENT OF THE CASE

The respondents are the Concerned Democrats of Florida and Edward Cohen, President. Respondents were prevailing plaintiffs in their lawsuit, filed under 42 U.S.C. §1983, for declaratory and injunctive relief against *Fla. Stat.* §105.09. Subsection one of the statute prohibited a "partisan political organization" from endorsing any candidate for election to judicial office. Under subsection two of the statute, a violation of subsection one was a misdemeanor of the second degree. The District Court agreed that the statute was unconstitutional, granted preliminary relief, and subsequently permanently enjoined the defendants from enforcing the statute in an opinion reported at 458 F.Supp. 60 (S.D. Fla. 1978).

As the prevailing party plaintiffs in the trial court, the respondents moved for an award of attorney's fees pursuant to 42 U.S.C. §1988. The District Court denied the motion without citation of authority, stating only that "the court concludes that an award of attorney's fees would be inappropriate in this case."

Respondents appealed to the United States Court of Appeals for the Fifth Circuit. The court of appeals placed the matter on the summary calendar, reversed the district court, and remanded "for an appropriate award of fees or for a finding on and a statement of the special circumstances which render such an award unjust." *Concerned Democrats of Florida v. Reno*, 601 F.2d 891, 892 (5th Cir. 1979). On remand, the district court again denied a fee award as "inappropriate" in a memorandum opinion reported at 493 F.Supp. 660 (S.D. Fla. 1980). As grounds for denying the motion for fees, the district

court aggregated five factors that had previously been held by the court of appeals not to constitute the requisite "special circumstances." *Id.* at 664.

Respondents filed a second appeal. The court of appeals again placed the cause on the summary calendar, reversed the district court, awarded respondents a fee of $3,262.50 for services performed prior to the first appeal, and reserved ruling with respect to fees for the two appeals. This unpublished opinion is set forth as "Appendix A" to the Brief of Petitioners.

The petitioners then filed a petition for rehearing or for rehearing en banc, which was denied by the court of appeals on February 9, 1981. Their petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS APPLIED SETTLED DOCTRINE IN AWARDING ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1988 IN A CASE IN WHICH THE DISTRICT COURT TWICE HAD FAILED TO COMPLY WITH THE CONTROLLING PRECEDENTS IN, FIRST, DENYING FEES AS "INAPPROPRIATE" AND THEN, ON REMAND AFTER REVERSAL, AGAIN DENYING FEES AS "INAPPROPRIATE" BY AGGREGATING AS "SPECIAL CIRCUMSTANCES" FIVE FACTORS THAT THE COURT OF APPEALS EXPLICITLY HAD HELD NOT TO CONSTITUTE "SPECIAL CIRCUMSTANCES"

The petition for writ of certiorari should be denied because petitioners have failed to make even a colorable showing that the judgment below falls within the criteria for review under Rule 17. Rule 17 specifies that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

Petitioners' "Argument" is set forth on pages 3-6 of their brief. Not a single line of it addresses the issue of why certiorari should be granted. Instead, petitioners, in their single-minded devotion to exhausting the litigative opportunities presented by this case, have reargued the merits of the decision below as though this Court were simply another rung in the appellate ladder. The petition is thus legally insufficient and ought to be denied.

A second reason for denying the writ is that the decision of the court of appeals was not only correct but routine. It constituted no more than an application of the "well-settled" rule, *Iranian Students Assoc. v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979), that a prevailing party plaintiff is presumptively entitled to fees under §1988 in the absence of special circumstances that would render an award unjust. This has been the consistent position of the court of appeals, and it has been followed in *every* case, with the arguable but sole exception of *Henderson v. Fort Worth Independent School District*, 574 F.2d 1210 (5th Cir. 1978), *vacated on rehearing en banc*, 584 F.2d 115 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979). The *Henderson* case, of course, "has no precedential value," 584 F.2d at 115. Thus, the decision of the court of appeals in reversing the district court in the case at bar follows settled practice, which has not been shown by petitioners to be in conflict with a decision of this Court or a decision of another court of appeals on the same matter. Rule 17.1(a), (c).

In its opinion on remand, the district court acknowledged the unanimity of Fifth Circuit precedent by noting that "[f]ollowing the Supreme Court's language in *Newman* [*v. Piggie Park Enterprises*, 390 U.S. 400 (1968)], the Fifth Circuit has continually awarded fees to prevailing parties." *Concerned Democrats v. Reno*, 493 F.Supp. 660, 662 (S.D. Fla. 1980). Nevertheless, the district court was "still of the opinion that an award of attorney's fees is inappropriate." *Id.* at 663.

The crux of the court's conclusion is contained in the following language, *id.* at 664:

> The Fifth Circuit has rejected (1) good faith on the part of defendants; (2) a finding of unintentional discrimination; (3) plaintiff's financial ability to pay counsel fees; (4) defendant's good-faith belief that a challenged statute is valid; and (5) that the burden of a fee award will fall on the taxpayers, as insufficient to constitute special circumstances rendering an award of attorney's fees unjust. However, this case combines all five of these factors with the added ingredient of a plaintiff who is a partisan, political organization. Added together they rise to the level of "special circumstances."

That conclusion was not only contrary to the well settled law of the circuit, it was illogical as well. The underlying intellectual process consisted of aggregating a series of legal nullities to produce "special circumstances." Using a mathematical model, it would be analogous to asserting that $5 \times 0 = 5$.

Furthermore, the district court's enumeration tends to obscure the matter in issue because the five factors actually overlap and duplicate one another. The first and fourth factors, in the circumstances of the case, are necessarily one and the same. No specific action or conduct of the petitioners was challenged apart from their readiness to enforce the criminal sanction of the challenged statute against the respondents in the event they violated its prohibition; *Fla. Stat.* §105.09 was alleged to be facially unconstitutional. For the same reason, the second factor ("unintentional discrimination") is also irrelevant to the case at bar. And the fifth factor cited by the district court (a burden on the taxpayers) is simply irrational: since an action under 42 U.S.C.

§1983 lies only for actions taken under color of law, the defendant will almost always be a public official, except in the relatively rare cases in which the plaintiff establishes state action on the basis of a public function or nexus theory, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In the ordinary §1983 case, the defendant will be a public official sued in his official capacity and the burden of the fee award will be borne by the public. *International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502, 503-04 (5th Cir. 1980). As this Court has said, "[f]ee awards against enforcement officials are run-of-the-mill occurrences . . . ." *Supreme Court of Virginia v. Consumers Union of the United States*, ____ U.S. ____, 100 S.Ct. 1967, 1978 (1980).

Thus, when the district court's opinion on remand is stripped of its rhetorical flourishes, the aggregated five factors are reduced to two: The good faith of the defendant and the plaintiff's financial ability to pay for counsel. Neither of these constitutes special circumstances in the context of applying §1988. This Court held in *Hutto v. Finney*, 437 U.S. 678, 693 (1978), that an award of fees under §1988 was independent of any finding of bad faith on the part of the defendants. And in the Fifth Circuit, a long line of cases has consistently rejected good faith as constituting "special circumstances," e.g., *Johnson v. State of Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979); *Morrow v. Dillard*, 580 F.2d 1284, 1298 (5th Cir. 1978), and *Brown v. Culpepper*, 559 F.2d 274, 278 (5th Cir. 1977). Nevertheless, the district court insisted that the good faith of the defendants "clearly has to figure in somewhere. . . ." *Concerned Democrats v. Reno*, 493 F.Supp. 660, 663 (S.D. Fla. 1980).

Similarly, the financial ability of a plaintiff to pay for counsel has been repeatedly rejected by the court of appeals as irrelevant to the purposes of §1988. See the cases cited in *International Society for Krishna Consciousness, Inc. v. Collins*, 609 F.2d 151, 151-52 (5th Cir. 1980).

Notwithstanding this unanimous weight of authority, the district court asserted that it "must be free at least to consider plaintiff's financial position," *Concerned Democrats v. Reno*, 493 F.Supp. 660, 664 (S.D. Fla. 1980), and went on to "*assume*" that respondents "could certainly pay for their own counsel." *Id.* at 664 (emphasis added).

Additionally, both the good faith and means-of-the-plaintiff "defenses" to §1988 appear to have been rejected by this Court in *Mahoning Women's Center v. Hunter*, ___ U.S. ___, 100 S.Ct. 3006 (1980). Although *Mahoning* was a summary disposition, the Fifth Circuit drew the above inference based upon the questions presented in the petition for writ of certiorari and the cases cited by this Court in its memorandum opinion: "The results in *New York Gaslight Club* and *Consumers Union* indicate that neither the good faith of the parties nor the means of the plaintiff were appropriate grounds for the denial of a §1988 fee award in *Mahoning*." *Aware Woman Clinic, Inc. v. City of Cocoa Beach, Fla.*, 629 F.2d 1146, 1149, n. 2 (5th Cir. 1980). Accordingly, the district court's reliance on those two factors in denying fees was clearly erroneous and was properly reversed by the court of appeals.

Finally, the district court also added into its formula for special circumstances the fact that one of the respondents is a partisan political organization. No

authority is cited by the court on that point, and the legal significance of that status in relation to the application of §1988 is left entirely unexplained. It could not have been a suggestion that respondents do not enjoy the protection of 42 U.S.C. §1983, and there is certainly nothing obviously different, in terms of the remedial purpose of §1988, about the Concerned Democrats as a plaintiff than, for example, the plaintiff political group in *Iranian Students Association v. Edwards*, 604 F.2d 352 (5th Cir. 1979), or the plaintiff corporate commercial enterprise in *International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502 (5th Cir. 1980). Lacking a legal context, the district court's reference to political status appears to be an afterthought and was not found to be persuasive by the court of appeals.

The district court was plainly concerned by the fact that the case at bar did not present a claim of racial discrimination. This is apparent from the court's repeated references to that point. *Concerned Democrats v. Reno*, 493 F.Supp. 660, 662 n. 2, 663, 664 (S.D. Fla. 1980). But that contention was laid to rest by the Fifth Circuit in *Aware Woman Clinic, Inc. v. City of Cocoa Beach, Fla.*, 626 F.2d 1146, 1148 (5th Cir. 1980), holding that §1988 applies to all types of §1983 actions, "not merely those alleging invidious discrimination. . . ." Indeed, this Court has held that for §1988 purposes, the underlying §1983 claim need not even be of constitutional dimension. *Maine v. Thiboutot*, ____ U.S. ____, 100 S.Ct. 2502, 2506 (1980) (fees under §1988 "are available in *any* §1983 action," constitutional or statutory); *accord, Maher v. Gagne*, ____ U.S. ____, 100 S.Ct. 2570 (1980).

Again, the decision of the court of appeals was merely a correction of a plain misapprehension of the controlling law by the district court. Indeed, the rationale of the district court's denial of fees on remand was so discordant with settled authority as to persuade the court of appeals to enter an outright reversal rather than to remand again to the district court. Faced with a recalcitrant district judge, the court of appeals found it appropriate, in the interest of judicial economy, to make the fee award itself under the procedures set forth in *Davis v. Roadway Express, Inc.*, 590 F.2d 140, 143 (5th Cir. 1979). *See also, Brown v. Culpepper*, 561 F.2d 1177 (5th Cir. 1977).

In summary, the case at bar is paradigmatically inappropriate for review by writ of certiorari. There is no conflict with the decisions of other courts of appeal or the decisions of this Court. The circumstances that resulted in two reversals of the district court for failure to follow settled doctrine are, if not *sui generis*, at least unlikely to recur in future litigation. The court of appeals did no more than to correct a clear misapplication by the district court of 42 U.S.C. §1988. In short, this case presents no occasion for this Court to decide an important question of federal law under Rule 17.1(c) or to exercise its supervisory authority over lower federal courts under Rule 17.1(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Michael R. Masinter
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By /s/ STEVEN WISOTSKY
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